Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT FOR THE UNITED STATES
October Term, 1993

BRUCE BUCHBINDER and ELAINE BUCHBINDER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) What is the standard that must be met by the United States Tax Court in order to fulfill a Petitioners' right to the scope of review mandated by Congress pursuant to Title 5 United States Code Section 706, which requires, among other things, that the Tax Court hold unlawful and set aside agency action, findings, and conclusions found to be: arbitrary, and otherwise not in accordance with law; contrary to constitutional rights, powers, privileges, or immunities; in excess of statutory authority; not in observance of legal procedure; unsupported by substantial evidence; unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court (here the Tax Court); and in making these determinations, the Tax Court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error, and whether the petitioners

herein have been substantially deprived of these remedies.

2) Where did the Courts, governmental agencies, or agents get the authority to completely and totally override, supersede or ignore what the Constitution plainly and clearly states in Article I, Section 2, clause 3; Article I, Section 8, clause 1; Article I, Section 9, Clause 4, and the rights secured thereunder?

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PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners, Bruce Buchbinder and Elaine Buchbinder, who are not trained in the complexities of legal practices, hereby petition for a writ of certiorari, to the United States Court of Appeals for the Ninth Circuit, for the purpose that a supervisory opinion may issue from this Honorable Court, reviewing the actions of the United States Tax Court, and the affirmance of the said actions

by the United States Court of Appeals for the Ninth Circuit.

The relief sought results from the subsequent ruling of the Tax Court and the Ninth Circuit Court of Appeals, which have effectively and substantially denied Petitioners' constitutionally protected right to procedural and substantive due process.

The Petitioners, in appearing pro se, rely on Haines v. Kerner (1972), 404 U. S. 519, Price v Johnson (1948), 344 U. S. 266, plus many others, in that "pro se," "pro per" litigants are not held to the same standards as attorneys, appearing on 'appeal' in this Court.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit has not been reported. A copy of the memorandum appears in Appendix A

The memorandum opinion of the United States Tax Court has been reported. A copy of the memorandum appears in Appendix B.

The Final Order and decision of the United States Tax Court has been reported. A copy of the final order and decision appears in Appendix C.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on July 23, 1993. A timely Petition for Rehearing was filed on August 6, 1993. The Court of Appeals denied the Petition for Rehearing on August 31, 1993, and is set forth in Appendix D.

The Tax Court Opinion in this matter was filed on December 13, 1990, and the final Order and Decision was entered November 26, 1991.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 USC Section 1254(1).

Authority to proceed in this Court is by authority of the people of the united States by their Constitution, Article III Section 2, clauses 1 and 2 in which this Court has Appellate jurisdiction.

The Petitioners have no other legal course of action to proceed in any other Court in the nation. The Petitioners have sought relief in every other governmental office available - the administrative agencies, the Tax Court and the Ninth Circuit Courts.

STATUTORY PROVISIONS INVOLVED

Title 5 United States Codes (Government Organization and Employees);

Section 554 Adjudications;

Section 702 Right of review;

Section 703 Form and venue of proceeding;

Section 706 Scope of review;

Specifically:

§ 554(a). This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved --

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court; [In pertinent part]

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof... [in pertinent part]

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, ... in a court of compentent jurisdiction... [in pertinent part]

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency actions. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be take of the rule of prejudicial error. (Sept 6, 1966, P.L. 89-554, § 1, 80 Stat. 393). [in pertinent part, Emphasis added]

Congressional Record, Proceedings and Debates of the 78th Congress First Session, Volume 89 Part 2, March 2, 1943 to April 5, 1943 (pages 1459 to 2940) at page 2580, where it is clearly stated:

"The Sixteenth Amendment authorizes the taxation of income 'from whatever source derived'--thus taking in investment income--'without apportionment among the several states.' The Supreme Court has held that the Sixteenth Amendment did not extend the taxing power of the United States to new or excepted subjects but merely removed the necessity which might otherwise exist for an apportionment among the States of taxes laid on income whether it be derived from one source or another. So the amendment made it possible to bring investment income within the scope of a general income-tax law, but did not change the character of the tax. It is still fundamentally an excise or duty with respect to the privilege of carrying on any activity or owning any property which produces income.

The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income

which they produce. The income is not the subject of the tax; it is the basis for determining the amount of the tax." (Emphasis added)

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution, provides, in pertinent part:

"No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VIII of the United States Constitution, provides, in pertinent part:

"... nor excessive fines imposed ..."

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals had jurisdiction pursuant to Title 26 U.S.C. § 7483. The Tax Court had jurisdiction pursuant to Title 26 U.S.C. § 6213.

On or about August 14, 1985, the office of the Internal Revenue Service at San Jose, California issued to the Petitioners an alleged Notice of Deficiency, alleging a tax deficiency for the tax year 1981 with a penalty added pursuant to § 6653(a).

On November 6, 1985, the Petitioners timely filed a petition to the United States Tax Court (CR 1)[1].

On January 10, 1986, the Commissioner filed an answer to the Petition, which contained mere bald denials of the allegations by the Petitioners (CR 3).

On December 29, 1989, the Commissioner filed a motion for partial summary judgement, which was arbitrarily granted by the Tax Court (CR 10, 11).

On May 24, 1990, the Tax Court ordered the Petitioners to a pretrial hearing where they admonished the Petitioners to do a little investigation into cases and issues relating to their case (CR 19). The Petitioners did as the Court admonished.

On November 1, 1990, the Petitioners filed a Motion of Judgement of Dismissal; Abuse of Agency Authority; Memorandum of Law; moving pursuant to rule 121 of the Rules of

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[1] "CR" references are to the documents in the original record as numbered on the Tax Court's docket sheet.

Tax Court for summary judgement of dismissal on the grounds that the Internal Revenue Service had abused its authority in issuing the Notice of Deficiency (CR 24, 25).

The Buchbinders pointed out the mandates of due process they reasonably felt they were entitled to pursuant to Title 5 U.S.C. Section 554, 702, 703 and 706. The Petitioners' further stated that as a matter of statutory and constitutional right, they were entitled to a full judicial review, relative to their due process rights guaranteed by Article I, Section 2, clause 3; Article I Section 8 clause 1; and Article I Section 9 clause 4. This review was to specifically be a full judicial review of issues regarding the IRS's jurisdiction to implement the Notice of Deficiency procedures against them in light of the totality of the circumstances. The Petitioners insisted that this review must be based upon the whole record.

The Commissioner failed to review, or so much as even acknowledge the issues raised by

the Buchbinders. The Commissioner without reason, simply categorized the issues as frivolous and groundless.

On December 13, 1990, the Tax Court filed its Memorandum Opinion stating that...

"...Petitioners raise a multitude of arguments that have been rejected as frivolous by this court and every court... Petitioners' Motion to Dismiss will be denied without further comment."

while relying on weak supporting cases and further stating summary judgement was appropriate...

"...if the pleadings...show that there is no genuine issue... a decision may be rendered as a matter of law," citing Rule 121(b). See Memorandum Opinion, Appendix B, pages 6-7.

In their Motion and Supporting Memorandum, the Buchbinders raised complex mixed questions of law and fact in which historical facts had to be concluded before applicable law could be applied, with a subcategory of mixed question doctrine, including questions of Constitutional fact.

For the tax court to categorize these issues as frivolous and to state that there was no genuine issue, not only deprives the

Petitioners - the Buchbinders - of full judicial review and due process, but leaves the impression that the judges presiding on the Tax Court seem to believe that the U. S. Constitution and the written laws of the land have nothing to do with the issues of taxation.

On April 19, 1991, Petitioners filed a Petition to Vacate and Abate the Action, exercising their right to petition for redress of grievance pursuant to Article IV Section 2, Amendments I, IX, and X. The Petitioners complained and alleged of illegal and unlawful acts of the Respondent, and petitioned the Tax Court to order the alleged Notice of Deficiency vacated and abated in its entirety, upon lack of jurisdiction over the Petitioners and the subject matter.

The Tax Court subsequently filed this Petition as a Motion to Dismiss (CR32). However, this motion has neither been granted nor denied. The issues raised were never

adequately addressed by the Commissioner or the Tax Court.

On October 21, 1991, the Commissioner filed a Motion for Entry of Decision which also was arbitrarily granted by the Tax Court (CR 37). In his motion, on pages 4-5, the Commissioner derides the issues raised by the Petitioners as frivolous arguments and "...groundless allegations of error..." without specifically addressing the issues. Further, on page 2, the Commissioner confuses the issues by asserting they are "...frivolous arguments directed at the constitutionality of the Internal Revenue laws..." Petitioners would like to point out here that they never challenged the constitutionality of the taxing statutes; their challenges were instead jurisdictional in nature.

Finally, on November 15, 1991, Petitioners filed a response to the Respondent's Motion for Entry of Decision, wherein Petitioners asserted that they were entitled as a matter of legal right to have

their case decided on the legal and factual merits of their case alone, with full consideration given to their constitutionally guaranteed rights, their Citizenship and residence status, and the geographical situs of the income in question, consistent with the limitations placed upon the federal government's power to tax (CR 39).

On November 26, 1991, the Tax Court entered its final Order and decision. See Final Order and Decision, Appendix C.

None of the legal and factual issues raised by the Buchbinders were given any substantial legal analysis by the Tax Court, nor was there a well-reasoned conclusion by the Tax Court. The Buchbinders pointed out in their responsive pleading and their motion to dismiss, the legal precepts of why the Notice of Deficiency did not apply to them. Thus,

such notice was arbitrary and invalid as a matter of law and fact[2].

The Tax Court Judge simply ignored the law of taxation, the Constitution for the United States, and entered judgement against the Buchbinders.

The Buchbinders timely filed a Notice of Appeal on February 19, 1992 (CR 41). The Opening Brief on Appeal was filed on May 7, 1992. In their Opening Brief they argued that where Congress has expressly spoken on the subject, the question of interpretation is closed.

The Buchbinders' pointed out the mandates of due process they reasonably felt they were entitled to, bringing the case before the Court under the provisions of Article III Section 2 of the Constitution for the United States.

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[2] See the Buchbinders' legal argument and analysis in the response to the Respondent's Motion for Entry of Decision at Item 4, Excerpt of Record, and the Buchbinders' Motion for Dismissal at Item 5, Excerpt of Record.

The Buchbinders' further pointed out that a Court's factual inquiry of agency's record is to be "searching and careful." Also, the substantial evidence test is essentially a case-by-case analysis requiring review of the whole record. (Turcios v Ins (9th Cir., 1987), 821 F2d 1396, 1398. Substantial evidence means "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v Perales (1971), 402 U.S. 389, 401; citing Consolidated Edison Co. v. NLRB (1938), 305 U.S. 197, 229; McAllister v Sullivan (9th Cir., 1989), 880 F2d 1086, 1089. Also, the Court must consider the record as a whole, weighing both the evidence, that supports and the evidence that detracts from the agency's decision. Davis v Heckler (9th Cir., 1989), 873 F2d 323, 326.

The Buchbinders again asserted that they were entitled as a matter of legal right to have their case decided on the legal and factual merits of their case alone, as stated

in the Eisner Opinion (Eisner v. Macomber (1920), 252 U.S. 189, 206), with full consideration given to their Constitutionally guaranteed protections under Article I Section 2 Clause 3 and Article I Section 9 Clause 4. The Buchbinders argued again they were entitled to finding regarding their Citizenship and residence status and the situs of the income in question, consistent with limitations placed upon the federal government's power to tax.

The Commissioner's brief for the Appellee was filed on June 1, 1992. The brief found that; the Tax Court ruled in the Commissioner's favor because [taxpayer's] raised no genuine issues and only stated frivolous legal arguments; and arbitrarily categorized the appeal as frivolous, groundless and meritless, and asked the Appeals Court to impose sanctions. See Appellee's Brief, pages 10, 18, 19, 20, 26, 27, 30, and 33.

Further, the Commissioner, in his brief, confused and slanted the issues, and on one occasion deliberately distorted the issues. On page 1 in the Statement of the Issues, the Commissioner completely ignores the issues raised by the Petitioners. The Commissioner simply regurgitated the same false accusations, relative to the issues as he did in the Tax Court. On page 13 of his brief, in the statement of the case, the Commissioner asserts that [taxpayers] in their response to Motion for Entry of Decision continued to make frivolous assertions that the income tax is unconstitutional - an assertion the Petitioners never made! This false accusation was raised once before in the Tax Court by the Commissioner, and demonstrates that the Commissioner not only does not understand the issues raised, but attempts to deliberately distort the issues by making these false accusations.

On page 14 of his brief, in the Summary of the Argument, the Commissioner states that

"on appeal [taxpayers] raise the contention that wages are not income and therefore are not taxable," further stating "...this argument has been rejected as frivolous many times by many courts, including this court."

It is evident that the Commissioner did not read Petitioners' Opening Brief. Nowhere did Petitioners' contend in their Opening Brief that wages are not income. However, the confusion does not end there. On page 15 of his brief, the Commissioner accuses the Petitioners of raising on Appeal "...frivolous arguments they were warned by the Tax Court not to advance." The Commissioner continues on page 20, again accusing the Petitioners of raising on appeal, the contention "...that wages are not income and therefore not subject to the income tax." On page 21, the Commissioner states "at all events, their contentions are completely without merit. The argument that a person's wages are not income has repeatedly been rejected by this Court and every other court to which it has ... been

presented, and is patently frivolous." Again, the Petitioners strenuously emphasize that this argument and contention was never raised in their opening brief.

On page 22 in Appellee's brief, the Commissioner confuses the issues in a reference to the Pollock case (Pollock v Farmer's Loan & Trust Co. (1895), 157 U.S. 429, 15 S.Ct. 673, aff. reh. 158 U.S. 601, 15 S.Ct. 912). The Commissioner states that the Pollock court did not question the power of Congress to impose an unapportioned tax on income, erroneously citing Pollock, (158 U.S. 637), in that "unapportioned" infers direct taxation. The Commissioner fails to mention that the Pollock Court was discussing excise taxes at 637, as opposed to direct taxes, a distinction fatal to his argument. Then the Commissioner asserts that the purpose of the Sixteenth Amendment was to relieve Congress of the need to apportion any tax that under Pollock otherwise would require apportionment and cites Brushaber among other cites. It is

evident that the Commissioner not only confuses the issues, but is confused himself as to the difference between direct and indirect tax. He fails to take note of the irreconcilable conflict between the two Supreme Court cases, Brushaber and Eisner. This difference was briefed extensively in the Buchbinders' Response to the Respondent's Motion for Entry of Decision, (See item 4, Excerpt of Record, pages 22-44, 63-64). The distinction between direct and indirect taxation is fundamental to understanding the federal government's Constitutional power to lay and collect taxes. The Commissioner, however, fails to take note of this distinction and therefore cannot properly address the issues raised by the Buchbinders. Instead, the Commissioner because he does not understand the distinction, completely confuses the issues.

The Commissioner in Appellee's Brief deliberately distorts what the Petitioners contend in their Opening Brief, as on page 20

and 21, where the Respondent states that "...taxpayers raise the ... contention ... that wages are not income and therefore not subject to the income tax." Then Respondent completely contradicts himself by saying in the very next sentence "while asserting that the numerous cases holding that wages are income are erroneous ... taxpayers unsurprisingly fail to cite any authority that stands for the proposition that wages are not, in fact, income." (emphasis added). The reason is simple - Petitioners did not cite any such authority because that was not the question or issue raised nor was that proposition being brought before the Court.

Respondent on page 27 in his brief accused the Petitioners of raising "frivolous , meritless arguments," and on page 30 encourages the Court of Appeals to impose a penalty against Petitioners due to what he terms "...the frivolous nature of the instant case..." Respondent then goes on, in the same paragraph to define frivolous by stating "An

appeal is frivolous 'when ... the arguments of error are wholly without merit'" quoting Wilcox 848 F2d at 1009, McConnel 661 F2d at 118 and other cites. However, these cites are not applicable, as Constitutional issues are not wholly without merit, unless the Constitution has been declared void.

The Commissioner, in his brief, completely fails to offer any substantial argument on the real issues raised by the Petitioners. In reality, the Commissioner's argument amounts to nothing more than heresy because it deletes the particular facts and propounds correct statements of law in an effort to make the untrue appear to be true.

The Buchbinders filed a reply brief on August 13, 1992. arguing that in their case, 1) there is involved a mixed question of law and fact by which the historical facts must be concluded before the applicable law can be applied. Petitioners argued 2) there is also involved a subcategory of the mixed question doctrine, which is a "Constitutional fact"

question involving applications of Constitutional principles to the factual determinations. Lastly, Petitioners argued 3) there are involved important questions concerning the scope and meaning of United States Supreme Court decisions, thus contending there exists three substantial questions, that all must be reviewed together before just findings and conclusions can be arrived in the matter.

Relative to these three important questions, Petitioners were precluded from a full and meaningful judicial review by the Tax Court and the Ninth Circuit Court of Appeals, pursuant specifically to the scope of review mandated by Title 5 U.S.C. Section 706.

On or about July 23, 1993, the Ninth Circuit Court of Appeals entered an unpublished Memorandum Opinion, affirming the decision of the Tax Court. In its Memorandum Opinion, the Court collapsed all of Petitioners Constitutional arguments, their contentions of case law as well, into the

single unraised issue, brought up by the Commissioner in Appellees Brief. That issue was not raised by Petitioners and Petitioners' arguments were neither unitary nor so simple as that characterized by the Court's decision.

On August 5, 1993, the Buchbinders filed a timely petition for rehearing, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. The Petitioners pointed out that in the Petitioners opinion, several material points of fact and law had been deliberately overlooked.

In their Petition for rehearing, the Buchbinders argued that their briefs raised more than a single argument. Their briefs involved mixed questions of law and fact of Constitutional import. These issues, mixed questions were not addressed in the decision issued by the Ninth Circuit Court of Appeals. The Buchbinders argued further the Court's decision ignored the relevant legislative history recited extensively in their briefs. They also argued for rehearing pointing out

that none of the arguments advanced by them were addressed.

In the Memorandum of Decision issued by the Court, the Court left unanswered and unaddressed essentially all material points of law and fact which they had actually raised in their briefs. Thus they were denied a full review under Title 5 U.S.C. sections 554, 702, 703 and 706.

On August 31, 1993, the Petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three important reasons. First, this Court must determine if the Tax Court is exceeding its codified jurisdictional limits because thousands of litigants are affected annually. Second, this Court must exercise its supervisory powers to keep consistency and conformity in standards of review when Circuits vitiate published rulings through unpublished but binding decisions. Third,

this Court should resolve important issues that the lower courts refuse to address concerning issues of jurisdictional, constitutional, and factual matters, because litigants are not receiving a full and meaningful review pursuant to Title 5 U.S.C. § 554, 702, 703 and 706 and thereby are precluded from procedural and substantive due process.

The judgement of the United States Tax Court, the subsequent affirmation by the Ninth Circuit Court of Appeals, and the subsequent effects that will be brought upon Bruce Buchbinder and Elaine Buchbinder is contrary to the express holdings of this United States Supreme Court in: Pollock v Farmer's Loan & Trust Co. (1895), 157 U.S. 429, 15 S.Ct. 673, aff. reh. 158 U.S. 601, 15 S.Ct. 912; Brushaber v Union Pacific Railroad Company (1915), 240 U.S. 1, 36 S.Ct. 236; Stanton v Baltic Mining Co. (1916), 240 U.S. 103, 112, 36 S.Ct. 278; William E Peck and Co. v Lowe (1918), 247 U.S. 165, 172-173, 38 S.Ct. 432;

Eisner v Macomber (1920), 252 U.S. 189, 206, 40 S.Ct. 189; Cook v Tait (1924), 265 U.S. 47, 44 S.Ct. 444; and Congress' own clear and unambiguous statement in the Congressional Record at: Congressional Record, Proceedings and Debates of the 78th Congress First Session, Volume 89 Part 2, March 2, 1943 to April 5, 1943 (pages 1459 to 2940) at page 2580; cited supra.

The right of the individual citizens, which make up the public of the North American Continent, to effective and meaningful access to their courts, is a question of paramount and significant importance. The only means the average individual of the American Public has to check government excesses, and abuse of the awesome powers of it's agencies, is to bring the cause before the judges of the courts. When these judges are unwilling to effect complete and sufficient inquiries, into the agency's asserted authority and/or jurisdiction, in conjunction with the Constitutional guarantees reserved by the

American public, these individuals are left completely without any remedy against government excesses and abuses of limited and enumerated powers.

It has become the customary practice of Internal Revenue Service Centers and District Director's offices to send out arbitrary accusations of liability for payment of taxes. These accusations are being disguised as notices of deficiency. This convoluted practice is being implemented by these IRS offices to avoid being suffered with the rightful burden of proof, with respect to these unfounded accusations. The members of the public, who are receiving these arbitrary accusations, are in good faith attempting to follow the peaceful procedures offered to them in the notices, petitioning the United States Tax Court in a reasonable effort to peacefully resolve the matters lawfully. Unfortunately, these members of the American Public are running into insensitive Special Trial Judges on the United States Tax Court who are more

than willing to treat these petitioning individuals as though they were nothing more than a bunch of mindless dupes.

The petitioners make issue of the fact that this Court has stated that a citizen has two equal alternatives with which to challenge the federal taxing authorities in issues of constitutionality, jurisdiction, etc. See, e.g. Cheek v United States (1991), 498 U.S. 192 on writ of certiorari from the 7th Circuit. Although petitioners here are not challenging the constitutionality of the taxing statutes, they are challenging the unavailability of a forum where the jurisdictional challenges can be heard. Stating at least twice in the Cheek case, supra, this Court made it clear that an individual who has challenges to make to the federal taxing agency can do either one of two equal alternatives. Giving no preference to either, this Court stated:

"There is no doubt that Cheek, from year to year, was free to pay the tax that the law purported to require, file for a refund and, if denied, present his claims of invalidity,

constitutional or otherwise, to the courts. See U.S.C. §7422. Also, without paying the tax, he could have challenged claims of tax deficiencies in the Tax Court, 26 U.S.C. § 6213, with the right to appeal to a higher court if unsuccessful. § 7482(a)(1)" (Emphasis added)

It is to the second named alternative that these Petitioners address.

The Petitioners have brought to the attention of the Tax Court specifically worded issues for its review. These issues went directly to the jurisdiction of the taxing agency on the matters involved, and therefore to the jurisdiction of the Tax Court. The Tax Court denied any review or hearing on any of those issues. Bruce Buchbinder and Elaine Buchbinder were not afforded a trial, nor was any of the scope of review as mandated by Title 5 U.S.C. Section 706 afforded to the Buchbinders.

This attitude toward the Petitioners shown by the Tax Court is arbitrary and prejudicial. This attitude also goes against the Tax Court's duty as delegated to it through the Administrative Procedures Act

(APA), specifically at section 706 which mandates that Court's standards of review, and the line of Supreme Court reasoning, as exemplified in the Cheek case mentioned above.

Further, the action of the Tax Court precludes any meaningful review by any appellate court because it does not allow a complete record to be made for the petitioners to take up. Title 28 of the United States Code states that the Appeal Courts are the designated courts of de novo review of all Tax Court issues, at 28 U.S.C. § 2072.

Tax Court's duty imposed by the APA

In the APA at section 706, there are given the delegated guidelines for the standard of review of the Tax Court. The first paragraph of that statute states the reviewing court shall decide

"all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." (emphasis added)

The mandated guidelines follow. Then it states that in making those determinations so authorized to do, the court shall...

"review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

If the Tax Court is refusing to take jurisdiction over interpreting constitutional and statutory provisions (jurisdiction being the prime threshold issue on either), it cannot then determine the meaning or applicability of the terms of an agency action in any meaningful way in keeping with its mandated guideline. While it is true that an earlier delegation of authority to the Tax Court could have arguably limited the scope of its review, since 1968 the Congress has decided that this court has an Article I status. See Title 26 U.S.C. § 7441.

Petitioners left without remedy

Therefore, for the reasons stated above, the Petitioners are left with no adequate remedy at law for their properly brought and specifically plead issues. It cannot be contemplated by Congress to leave its citizens without the ability to make an adequate record

or to have an adequate and meaningful review of that record. Nor could Congress have intended that those individuals not have a meaningful forum for their grievances when the government or its agents pursue those citizens with allegation of liabilities - all unsubstantiated and unproven.

In making an improper factual finding, the Tax Court below erred grievously. Then the Ninth Circuit, the first court of review, not only affirmed that error, but also indicated a dark trend as to its unpublished opinions. To remember the words of Boyd v United States (1886), 116 U.S. 616, at 635:

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

Without authorization by this Court or any other case law authority, the Ninth Circuit Court has manufactured a new standard of review for certain tax litigants for whom it will not publish its opinions. Litigant-Appellants are now additionally burdened by

having to determine what standard of review their tax case will be held to.

The Ninth Circuit has chosen to avoid all of the problems of complex, politically unpopular issues, by simply not publishing certain opinions. When the Circuits do not publish opinions, it becomes very difficult to find or discover certain types of cases which could be dispositing or guiding in similar fact situations.

The Petitioners would like to emphatically state that they have not objected at any time to the proper form and order of government, - lawfully exercised. This includes the power of government to collect taxes or the raising of revenue by lawful means, controlling and regulating commerce, according to the guidelines set forth in the Constitution. These are not at issue.

The question concerning the governmental agencies, their agents and the courts having authority to override or supercede the

Constitution is resolved by the Constitution itself:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the constitution or the laws of any State to the contrary not withstanding." Article VI clause 2 (Emphasis added).

"The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; ..." Article VI clause 3 (Emphasis added).

Very specifically and pointedly, all in government are to uphold the Constitution. Only by full and open discussion of the people within the boundaries of the several United States can the Constitution of our Republic be altered. Terry v. Ohio stated ...

"There have been powerful hydraulic pressures throughout our history that bear heavily on the court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. yet if the individual is no longer to be sovereign, if the police can pick him up

whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country." Terry v. Ohio (1967), 392 U.S. 39. (Emphasis added)

The order of government in our country can not be changed at the whim of any agency in government.

Rights secured by the constitution can not be ignored. Not by the executive branch, not by the legislature, not by the Courts, all whom took an oath of office to protect and defend the Constitution (United States Constitution Art VI cl 2, cl 3), or by any agency or instrumentality of government. This is plainly stated in 16 Corpus Juris Secundum (CJS) section 199 beginning on page 976 relating to Constitutional Law.

"The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts;..." (Emphasis added).

And take Judicial Notice of the next statements... the source of rights, the duty

of the court, and the criminal liability of those who violate such rights.

"The Constitutions are not the sources of our personal rights. Our theory of government is that the people, in full possession of inherent, inalienable rights, have formed the government in order to protect these rights, and have incorporated them into the organic law as a shield against unwarrantable interference by any department of government.

The court must ever be watchful to protect the personal rights guaranteed by state and federal constitutions. Constitutional rights cannot be made dependent on the favor of the court, but may be asserted as a matter of right; and in the matter of safeguarding these constitutional rights the court looks to the substance, rather than the technical forms of procedure taken to invoke the protection of the law.

The fundamental rights protected by the constitutional guaranties may not be transgressed with impunity or be discarded because of expediency. neither may they be abridged or suspended, even for a single moment, except in the manner and under the circumstances specifically provided by the law." ibid (Emphasis added)

Your Honors, there are no declared circumstances existing in our country to suspend, deny or ignore any right secured, preserved and protected by the Constitution. To finish this quote of constitutional law from Corpus Juris Secundum...

"The mere statement of such guaranties in constitutions is a prohibition by necessary implication of legislation or conduct

therewith, and renders such legislation or conduct void, ..." end quote. ibid (Emphasis added).

By what other standard can a Court act? By what authority can a Court deny any individual such specifically named rights as to the right of an unbiased full evidence hearing? By what authority can a Court ignore valid issues and reasonable questions of law and governmental misapplied facts?

CONCLUSION

For the forgoing reasons, this petition for certiorari should be granted.

The Administrative Procedure Act, Title 5 of the United States Code is the only source of protection that the American citizen has against arbitrary governmental agency actions, if the scope of review mandated by Title 5, Section 706 is viewed by the lower courts as meaningless, the American citizens are then stripped bare of any protection and are reduced to victims rather than American citizens.

The Petitioners have become more knowledgeable directly because the Tax Court admonished them to do a little investigation into the cases and issues relating to their case. This was done. A massive fraud was thereby uncovered against, not just the Petitioners, but the vast majority of the American people.

Take Judicial Notice of what the Honorable Justice Brandeis stated:

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes the lawbreaker, it breeds contempt for the law; it invites anarchy. To declare that in the administration of ... law the end justifies the means...would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Justice Brandeis in Olmstead v. United States (1928), 277 U.S. 438 at 485; 48 S.Ct Rptr 564, 575.

The Petitioners plead with this Court as the Court of last resort in the Nation known as The United States of America, to address this Writ of Certiorari.

Respectfully submitted,

_____

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_____

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DATED :_____

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER; ELAINE BUCHBINDER,	)	
	)	No. 92-70114
Petitioners-Appellants,	)	Tax Court No. 0971-3
vs.	)	
COMMISSIONER INTERNAL REVENUE SERVICE,	)	MEMORANDUM*
	)	(Filed Jul. 23, 1993)
Respondent-Appellee.	)	

Appeal from a Decision of the
United States Tax Court

Submitted June 18, 1993**
San Francisco, California

Before: FAIRCHILD,*** BEEZER and WIGGINS, Circuit Judges

OVERVIEW

The tax court granted a motion for partial summary judgement and a motion for entry of decision against the Buchbinders,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by

disallowing two loss deductions claimed by the Buchbinders in their 1981 tax year. The taxpayers appeal. The tax court had jurisdiction pursuant to 26 U. S. C. §§6213(a), 6214(a), and 7442. We have jurisdiction pursuant to 26 U. S. C. §7482. We affirm.

STANDARD OF REVIEW

We review the tax court's grant of summary judgement de novo, see Estate of Schnack v. Commissioner, 848 F . 2d 933, 935 (9th Cir. 1988), and the imposition of sanctions under Tax Court Rule 104(c) for an abuse of discretion. See Larsen v. Commissioner, 765 F. 2d 939, 941 (9th Cir. 1985); see also Aruba Bonnaire Curacao Trust Co. v. Commissioner,

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9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

*** Hon, Thomas E. Fairchild, Senior United States Circuit Judge for the 7th Circuit Court of Appeals, sitting by designation.

777 F . 2d 38, 43-44 (D.C. Cir. 1985), cert. denied, 475 U.S. 1086 (1986).

DISCUSSION

The Buchbinders raise a single argument for reversing the tax court's grant of summary judgement and entry of decision in favor of the IRS. They argue that wages are not taxable income. We summarily reject this argument. Clearly, the law holds that wages are taxable income. See Maisano v. United States, 908 F. 2d 408, 409 (9th Cir. 1990); Wilcox v. Commissioner, 848 F. 2d 1007, 1008 (9th Cir. 1988); Stubbs v. Commissioner, 797 F. 2d 936, 938 (11th Cir. 1986) (argument alleging that wages are not taxable income has "been rejected by courts at all levdels of the judiciary and (is) patently frivolous."); Olson v. United States, 760 F. 2d 1003, 1005 (9th Cir. 1985) ("This court has repeatedly rejected the argument that wages are not income as frivolous ...."). Next, we consider the IRS's request for sanctions against the Buchbinders for bringing a

frivolous appeal. Section 6673 permits this court to impose a penalty on a taxpayer when the decision of the tax court is affirmed on appeal and it appears that the taxpayer's position is frivolous or groundless. 26 U.S.C. Section 6673 (1988). On appeal, the Buchbinders argue only that wages are not taxable income. Case law clearly establishes that this argument is frivolous. Maisano, 908 F. 2d at 411; Wilcox, 848 F. 2d at 1009; Stubbs, 797 F.2d at 938; Olson, 760 F.2d at 1005. Thus, we sanction the Buchbinders $2,500 for pursuing a frivolous appeal. The IRS has brought to our attention that the tax court ordered the Buchbinders to pay a penalty under 26 U.S.C. Section 6653(b) (2) in addition to the taxes owed for the year 1981. While the Buchbinders fail even to mention the penalty in their appeal, the IRS correctly indicates that Section 6653(b) (2) applies only to taxes due after September 3, 1982, and therefore cannot be imposed here. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L.

No. 97-248, Section 325(b), 96 Stat. 324, 617. Accordingly, we order the Buchbinders to pay the United States $2,500 as a sanction for pursuing this appeal. We vacate the penalty imposed by the tax court under Section 6653(b)(2) and affirm the remainder of its judgement.

T.C. Memo. 1990-627

UNITED STATES TAX COURT

BRUCE BUCHBINDER AND ELAINE F. BUCHBINDER, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 41563-85. Filed December 13, 1990.

Bruce Buchbinder and Elaine F. Buchbinder, pro se.

Paul J. Krug, for the respondent.

MEMORANDUM OPINION

NIMS, Chief Judge: This case was assigned to Special Trial Judge Carleton D. Powell pursuant to the provisions of section 7443A(b) of the Code and Rules 180, 181, and 182.[1] The Court Agrees with and adopts the opinion of the Special Trial Judge, which is set forth below.

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, and as in effect for the year in issue. All Rule references are to the Tax Court Rules of Practice and Procedure, except as otherwise provided.

APPENDIX B

OPINION OF THE SPECIAL TRIAL JUDGE

POWELL, Special Trial Judge: This case is before the Court on respondent's Motion for Partial Summary Judgment, filed December 29, 1989. The relevant facts are as follows.

On their 1981 Federal income tax return, petitioners claimed a deduction in the amount of $77,558 for "cancellation of bilateral contract." By notice of deficiency, dated August 14, 1985, respondent disallowed this deduction and others and determined a deficiency in the amount of $65,952 and additions to tax under section 6653(a)(1) and (2). Petitioners filed a timely petition. At the time of filing the petition, petitioners resided in San Jose, California.

The deduction for $77,558 was identified as arising out of alleged straddle transactions with Financial Securities Corporation (FSC). On January 17, 1989, respondent filed a Request for The admissions contained, inter alia, the following:

22. The transactions between petitioners and FSC were illusory and fictitious.

23. The transactions between petitioners and FSC were shams devoid of any economic substance.

24. Petitioners' primary reason for entering into these transactions with FSC was to achieve tax losses.

Under Rule 90(c) "Each matter is deemed admitted unless, within 30 days after the service of the request * * *, the party to whom the request is directed serves upon the requesting party (1) a written answer * * * or (2) an objection * * *." Petitioners failed to answer or to object.

On December 29, 1989, respondent filed a motion for partial summary judgment contending that the deemed admissions entitled him to summary judgment on the FSC issue. Petitioners filed an Opposition to Motion for Partial Summary Judgment and to Enlarge the Time to Answer Request for Admissions on February 20, 1990. In their opposition, petitioners, who are appearing pro se, blamed their failure to answer on advice purportedly

given by their advisor. We have rejected that excuse. Alternatively, petitioners stated:

> a case has been decided in the Tax Ccourt [sic] * * *, Freytag v. Commissioner, * * * [89 T.C. 849 (1987)], on the same issue, the said [sic] investment, and type of deductions. * * * Petitioners are willing to be bound by the Appeals Court decision on Freytag * * *. In this case petitioners need not waste additional court time, but can effectively have their facts decided, in line with Freytag.

On March 22, 1990, the Court entered an order in which we stated that while there may be similarities between this case and Freytag v. Commissioner, 89 T.C. 849 (1987), affd. 904 F.2d 1011 (5th Cir. 1990), the cases could not be consolidated. We further stated that "before we act on respondent's Motion for Partial Summary Judgment, we will afford petitioners a final opportunity to be heard," and set the case for hearing in Dallas, Texas. At that hearing petitioner Bruce Buchbinder appeared and stated, inter alia:

> what I would like, * * * if it were possible, to stipulate -- if you could stipulate my case to the Freytag case, because I feel that * * * when the Freytag case is determined [by the Court of Appeals], I would be bound by this

[sic] case and I believe that this [sic] case would set a precedent or it would be persuasive.

The Court gave petitioners an additional 60 days to decide whether they wished to settle the case or go forward on the record in this case. That time was extended to September 20, 1990. The Tax Court's opinion in Freytag was affirmed on July 6, 1990, and rehearing was denied on August 15, 1990. Freytag v. Commissioner, 904 F.2d 1011 (5th Cir. 1990). On September 20, 1990, the Court received a "mailgram" from petitioner Bruce Buchbinder in which he stated:

> The First Western case (Freytag) is generally considered to be analogous to the Financial Securities Corporation case. However, after my review I am now of the opinion that certain findings of fact in Freytag and other similar cases may not apply to my case.
>
> To resolve this uncertainty I would like to obtain a copy of the Tax Court trial transcripts of Freytag so that I may review this case in greater detail.

On October 4, 1990, the Court ordered that, if a settlement document was not submitted on or before November 5, 1990, it

would proceed with respondent's Motion for Partial Summary Judgment based on the admitted admissions and would also consider whether damages (now called a penalty) for delay under section 6673 should be imposed. The Court noted that petitioners had ample time to review the transcripts in Freytag.

On November 1, 1990, petitioners filed a document entitled "Motion for Judgment of Dismissal; Abuse of Agency Authority; Memorandum of Law" that we have filed as a Motion to Dismiss. That motion alleges that petitioners are not subject to Federal income taxes; that the income tax violates the uniformity clause; and that petitioners are not required to file income tax returns. In short, petitioners raise a multitude of arguments that have been rejected as frivolous by this Court and every court. See, e.g., Rowlee v. Commissioner, 80 T.C. 1111, 1119-1122 (1983); Abrams v. Commissioner, 82 T.C. 403, 410-412 (1984); Edwards v. Commissioner,

680 F.2d 1268 (9th Cir. 1982). Petitioners' Motion to Dismiss will be denied without further comment.

We turn to respondent's Motion for Partial Summary Judgment relating to the FSC issue. Summary judgment is appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b). Until our opinion was affirmed, petitioners contended that the FSC issue was controlled by Freytag v. Commissioner, 89 T.C. 849 (1987), affd. 904 F.2d 1011 (5th Cir. 1990). Freytag involved deductions for losses arising from straddle transactions of forward contracts for mortgage securities. Petitioners' case involves the same type of transactions. In Freytag, the Court found that the transactions were (1)

"illusory and fictitious and not bona fide," and (2) Even if the transactions were bona fide transactions, the transactions were entered into primarily, if not solely, for tax-avoidance purposes." 89 T.C. at 875-876. Based on these findings, the Court disallowed the losses claimed. As set forth above, petitioners have admitted the same facts. Petitioners, therefore, have not satisfied us that there is any meaningful difference between their case and Freytag.

Furthermore, as we noted in our order of October 4, 1990, petitioners have had ample opportunities to review the Freytag record and oppose respondent's motion by showing that there is a dispute of material fact. The opinion in Freytag was filed October 21, 1987, and the record in that case has been available for inspection either in this Court or the Court of Appeals for over three years. During that period, petitioners repeatedly stated that there was no material difference between

their case and Freytag. Even after our opinion in Freytag was affirmed and petitioner had a change of heart, they have not pointed out what material facts in their case may differ from those in Freytag. Accordingly, we do not find that there is any dispute as to the material facts. The purported transactions giving rise to the claimed loss deductions were illusory, fictitious, and devoid of economic substance. Under Freytag, the deductions are not allowable as a matter of law, and respondent's Motion for Partial Summary Judgment will be granted.

Finally, we are compelled to note that we are left with the unfortunate conclusion that delay has been petitioners' objective throughout these proceedings in dealing with the FSC issue. This conclusion is reenforced by the frivolous nature of their last motion. There is, however, another issue that is not the subject of respondent's motion, and we cannot dispose of the case at this time. But,

we strongly suggest that petitioners examine the provisions of section 6673 before they chart their course for the remainder of this litigation.

An appropriate order will be issued.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

BRUCE BUCHBINDER and ELAINE F. BUCHBINDER,	)	
Petitioners	)	
v.	)	Docket No. 41563-85
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

Upon due consideration of repsondent's Motion for Entry of Decision and Other Sanctions filed October 21, 1991, and petitioners' response thereto, it is

ORDERED that respondent's motion for entry of decision and other sanctions is granted for the reasons set forth in respondent's motion. It is further

ORDERED AND DECIDED that there is a deficiency in petitioners' Federal income tax for the taxable year 1981 in the amount of $65,952. It is further

ORDERED AND DECIDED that there is an addition to tax due from petitioners for the

taxable year 1981 pursuant to the provisions of Internal Revenue Code section 6653(a) (1) in the amount of $3,298. It is further

ORDERED AND DECIDED that there is an addition to tax due from petitioners for the taxable year 1981 pursuant to the provisions of Internal Revenue Code section 6653(a) (2) which amount equals 50 percent of the interest due on the portion of the underpayment attributable to negligence. It is further

ORDERED AND DECIDED that there is an addition to tax due from petitioners for the taxable year 1981 pursuant to the provisions of Internal Revenue Code section 6653(b) (2) which amount equals 50 percent of the interest payable on that portion of the underpayment attributable to fraud. It is further

ORDERED AND DECIDED that the deficiency for the taxable year 1981 constitutes a substantial understatement attributable to tax motivated transactions for purposes of computing interest payable with respect to such amount pursuant to the provisions of

Internal Revenue Code section 6621(c), formerly Internal Revenue Code section 6621(d).

Stephen J. Swift
Judge

ENTERED: NOV 26 1991

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER; ELAINE BUCHBINDER,	)	
	)	No. 92-70114
Petitioners-Appellants,	)	Tax Court No. 0971-3
vs.	)	
COMMISSIONER INTERNAL REVENUE SERVICE,	)	ORDER
Respondent-Appellee.	)	(Filed Aug. 31, 1993)

Before: FAIRCHILD*, BEEZER and WIGGINS, Circuit Judges

The petition for rehearing is DENIED.

* Hon. Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.